

Daniel T. Hayward, Esq.
Nevada State Bar No. 5986
Ryan W. Leary, Esq.
Nevada State Bar No. 11630
LAXALT & NOMURA, LTD.
9600 Gateway Drive
Reno, Nevada 89521
dhayward@laxalt-nomura.com
rleary@laxalt-nomura.com
Telephone: (775) 322-1170
Facsimile: (775) 322-1865

Gregg M. Mashberg, Esq.
(admitted *pro hac vice*)
Lawrence S. Elbaum, Esq.
(admitted *pro hac vice*)
PROSKAUER ROSE LLP
Eleven Time Square
New York, NY 10036
gmashberg@proskauer.com
lelbaum@proskauer.com
Telephone: (212) 969-3000
Facsimile: (212) 969-2900
Attorneys for Third-Party Defendants
Cede & Co. and The Depository Trust Company

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHINA ENERGY CORPORATION,)	3:13-CV-562-MMD-VPC
)	
Plaintiff,)	THIRD-PARTY DEFENDANTS
)	CEDE & CO. AND THE
vs.)	DEPOSITORY TRUST
)	COMPANY'S OPPOSITION TO
ALAN HILL, et al.,)	THIRD-PARTY PLAINTIFF'S
)	MOTION FOR REVIEW OF
Defendants,)	MAGISTRATE JUDGE'S ORDER
)	DATED APRIL 24, 2014
ELENA SAMMONS AND MICHAEL)	
SAMMONS,)	
Third-Party Plaintiffs)	
vs.)	
)	
CEDE & CO., THE DEPOSITORY TRUST)	
COMPANY, AND COR CLEARING, LLC)	
)	
Third-Party)	
Defendants.)	

1 Third-Party Defendants Cede & Co. (“Cede”) and The Depository Trust Company
 2 (“DTC”) (together, the “DTC Defendants”), hereby join in, adopt and incorporate by reference
 3 Third-Party Defendant COR Clearing LLC’s (“COR,” together with the DTC Defendants, the
 4 “Third-Party Defendants”) opposition (the “COR Opposition”) to Third-Party Plaintiff’s Motion
 5 for Review (the “Motion for Review”) of U.S. District Judge of Magistrate’s Order, dated April
 6 24, 2014, staying discovery (the “Stay Order”) pending this Court’s decision on Third-Party
 7 Defendant’s motions to dismiss the first amended complaint (the “MTD”) (Dkt. 210). The DTC
 8 Defendants also hereby submit the following memorandum of points and authorities to
 9 supplement the arguments raised in the COR Opposition.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**¹

11 **I. Third-Party Plaintiff May Not Use the Motion For Review as a Forum to** 12 **Reargue the Merits of the Fully-Briefed MTD**

13 As observed in the COR Opposition (at 9-11), Third-Party Plaintiff does not even come
 14 close to satisfying his burden of showing that entry of the non-dispositive Stay Order was clearly
 15 erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); LR IB 3-1(a);
 16 *see also Ideal Elec. Co. v. Flowserve Corp.*, 230 F.R.D. 603, 606 (D. Nev. 2005) (quoting
 17 *Burdick v. Comm’r*, 979 F.2d 1369, 1370 (9th Cir. 1992) for the standard for clearly erroneous
 18 review). Nor does Third-Party Plaintiff remotely demonstrate that Magistrate Judge Cooke
 19 abused her discretion by entering the Stay Order. *See* COR Opposition at 12; *see also Toven v.*
 20 *Metro. Life Ins. Co.*, 517 F. Supp. 2d 1174, 1175 (C.D. Cal. 2007) (finding where the magistrate
 21 judge has been designated to hear discovery motions, “the magistrate judge’s decision . . . is
 22 entitled to great deference by the district court.”) (quoting *United States v. Abonce-Barrera*, 257
 23 F. 3d 959, 969 (9th Cir. 2001).

24 Because Third-Party Plaintiff cannot sustain his burden, he instead makes clear that he
 25 intends to use the Motion for Review to improperly re-hash his Opposition (the “MTD
 26 Opposition”) to Third-Party Defendants’ fully-briefed MTD. *See* Motion for Review at 4-16.

27 _____
 28 ¹ The DTC Defendants respectfully refer this Court pages 1 to 7 of the COR Opposition for a recitation of the facts and procedural posture relevant to the Motion for Review.

1 Ninth Circuit law precludes Third-Party Plaintiff from doing so - and, to the extent that Third-
 2 Party Plaintiff asserts new facts or evidence in the Motion for Review, this Court cannot consider
 3 them in connection with its determination of whether to lift the Stay Order. *See United States v.*
 4 *Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000); *Aevoe Corp. v. AE Tech. Co.*, Case No. 2:12-cv-
 5 0053-GMN-RJJ, 2012 U.S. Dist. LEXIS 30085, at *6 (D. Nev. Mar. 7, 2012), appeal dismissed,
 6 727 F.3d 1375 (Fed. Cir. 2013) (recognizing that new arguments are improperly raised for first
 7 time on reconsideration where movant's burden is to show clear error of law).

8 Further, to allow Third-Party Plaintiff to re-argue the MTD Opposition would effectively
 9 permit him to use the Motion for Review as a sur-reply to the MTD. Of course, sur-replies are
 10 not contemplated or allowed under applicable law or the local rules of the District of Nevada.
 11 LR 7-2; *Westbrook v. GES Exposition Servs.*, Case No. 2:05-cv-00532-KJD-GWF, 2007 U.S.
 12 Dist. LEXIS 32131, at *7 (D. Nev. Apr. 27, 2007). To be sure, they are "highly disfavored, as
 13 they usually are a strategic effort by the nonmovant to have the last word on a matter." *Chirila v.*
 14 *Bank of Am., N.A.*, No. 3:11-cv-00005-RCJ-WGC, 2014 U.S. Dist. LEXIS 19023, at *20 (D.
 15 Nev. Feb. 14, 2014).

16 This Court will ultimately consider the merits of the MTD, including all of the arguments
 17 in the MTD Opposition. The question for the Court on the Motion for Review, however, is
 18 whether Third-Party Plaintiff has sustained his burden of showing that the non-dispositive Stay
 19 Order was clearly erroneous, contrary to law or entered in an abuse of discretion by the
 20 Magistrate Judge. As set forth in the COR Opposition, Third-Party Plaintiff has not sustained
 21 (and cannot sustain) this burden, and this Court should not disturb the Stay Order pending the
 22 disposition of the MTD.²

23
 24 ² Courts in this District have routinely stayed discovery pending the outcome of dispositive motions, just as the
 25 Magistrate Judge did here. *See, e.g., Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 507 (D. Nev. 2013);
 26 *Tradabay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 608 (D. Nev. 2011); *Davis v. Nevada*, Case No. 3:13-cv-00559 -
 27 MMD-WGC, 2014 U.S. Dist. LEXIS 44626, at *17 (D. Nev. March 31, 2014); *Rosetto v. Wells Fargo Home*
 28 *Mortg.*, Case No. 2:14-cv-00142-GMN-CWH, 2014 U.S. Dist. LEXIS 38327, at *5 (D. Nev. Mar. 24, 2014); *Lo v.*
Golden Gaming, Case No. 2:12-cv-01885-JAD-CWH, 2014 U.S. Dist. LEXIS 24265, at *8 (D. Nev. Feb. 26, 2014);
Abrego v. U.S. Bank Nat'l Ass'n, Case No. 2:13-cv-01795-JCM-GWF, 2014 U.S. Dist. LEXIS 13020, at *8 (D. Nev.
 Jan. 31, 2014); *Ramirez v. Wells Fargo Bank, N.A.*, Case No. 2:13-cv-01671-JCM-GWF, 2014 U.S. Dist. LEXIS
 12325, at *7 (D. Nev. Jan. 31, 2014); *Grand Canyon Skywalk Dev. LLC v. Steele*, Case No. 2:13-cv-00596-JAD-
 GWF, 2014 U.S. Dist. LEXIS 1550, at *15-16 (D. Nev. Jan. 6, 2014); *Rizzolo v. Henry*, Case No. 2:12-cv-02043-
 APG-VCF, 2013 U.S. Dist. LEXIS 64445, at *17-18 (D. Nev. May 3, 2013); *Stellia Ltd. v. B+S Card Serv. GmbH*,

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this 19th day of May, 2014, I caused to be served a true and correct copy of the forgoing *Third-Party Defendants Cede & Co. and The Depository Trust Company's Opposition to Motion for Review by U.S. District Court Judge of Magistrate's Order Dated April 24, 2014* by the method indicated:

XX by Court's CM/ECF Program

and addressed to the following:

Anjali D. Webster, Esq.
Justin J. Bustos, Esq.
Gordon Silver
100 W. Liberty Street
Reno, 89501

Michael N. Feder, Esq.
Gordon Silver
3960 Howard Hughes Parkway, 9th Floor
Las Vegas, NV 89169

Frances Floriano Goins, Esq.
Ulmer & Berne LLP
1660 West 2nd Street, Ste 1100
Cleveland, OH 44113
Attorneys for Plaintiff China Energy Corporation

Michael Sammons
15706 Seekers Street
San Anotnio, TX 78255
Defendant/Third Party Plaintiff

Richard L. Elmore, Esq.
Holland & Hart LLP
5441 Kietzke Lane, 2nd Floor
Reno, NV 89511
Attorneys for Defendant Thomas S. Vredevoogd

Edmund J. Gorman, Jr., Esq.
Attorney at Law, Ltd.
335 W. First Street
Reno, NV 89503
Attorney for Defendant Alan T. Hill

1 LOUIS M. BUBALA III
2 State Bar No. 8974
3 (lbubala@armstrongteasdale.com)
4 BRET F. MEICH
5 State Bar No. 11208
6 (bmeich@armstrongteasdale.com)
7 ARMSTRONG TEASDALE LLP
8 50 West Liberty, Suite 950
9 Reno, NV 89501
10 Telephone: (775) 322-7400
11 Facsimile: (775) 322-9049
12 Counsel for Third Party Defendant COR Clearing

13 and by U.S. Mail to Pro Se Parties addressed as follows:

14 Elena Sammons
15 15706 Seekers St
16 San Antonio, TX 78255
17 *Defendants / Third-Party Plaintiffs (Pro Se)*

18 Randy Dock Floyd
19 4000 Goff Road
20 Aynor, SC 29511
21 *Defendant (Pro Se)*

22 Jun He
23 231 Split Road Rd
24 The Woodlands, TX 77381
25 *Defendant (Pro Se)*

26 /s/ Yvonne Larssen
27 An employee of Laxalt & Nomura, Ltd.